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No. 81-116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CRAIG E. DAVIS, Petitioner,

V.

UNITED STATES OF AMERICA and
EDMOND J. MARTIN, SPECIAL AGENT,
INTERNAL REVENUE SERVICE,
Respondents,

STEPHEN M. ORR, Petitioner,

V.

UNITED STATES OF AMERICA and
EDMOND J. MARTIN, SPECIAL AGENT,
INTERNAL REVENUE SERVICE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES O. GRIGSON
305 Stewart Title Bldg.,
812 San Antonio
Austin, Texas 78701
512/477-5791

ATTORNEY FOR PETITIONERS
CRAIG E. DAVIS and
STEPHEN M. ORR.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the communications between an attorney and his client regarding the preparation of the client's tax returns constitute communication within the ambit of the attorney-client privilege?

2. Whether an attorney's workpapers and other written material regarding a client should be produced pursuant to IRS summons, and if so, whether such documents should be examined by the courts to determine whether any materials are protected by the work product doctrine or the attorney-client privilege?

3. Whether the Government's burden of proof in an IRS summons enforcement proceeding can be met by filing a petition to enforce with an accompanying affidavit from an IRS agent?

4. Whether an attorney can in any instance assert the rights of his client against compelled testimony under the Fifth Amendment?

5. Whether litigants opposing enforcement of IRS summonses are entitled to pre-trial discovery in order to meet their burden of proof under *United States v. LaSalle National Bank*, 437 U.S. 298 (1978)?

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Petitioners, Craig E. Davis and Stephen M. Orr, respectfully pray that a writ of certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Fifth Circuit, entered on February 12, 1981.

OPINION BELOW

The opinion of the Court of Appeals is reported at 636 F.2d 1028. A copy of the slip opinion is attached as Appendix A.

JURISDICTION

The judgment and opinion of the Court of Appeals in these cases were entered on February 12, 1981 as shown by Appendix A. Petitioners filed Petitions for Rehearing and Suggestions for Rehearing En Banc, which were denied by the Court of Appeals on May 1, 1981. Copies of the orders denying the Petitions for Rehearing and Rehearing En Banc are attached as Appendix B. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1) and Rules 17 and 19 of the Rules of the Supreme Court of the United States. Since the issues sought to be reviewed are closely related, Petitioners are filing a single petition for writ of certiorari in accordance with Supreme Court Rule 19.4.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

2. Internal Revenue Code of 1954, 26 U.S.C. § § 7402 (b), 7602, 7604, 7605(b):

> § 7402(b) If any person is summoned under the

internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court . . . shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

§ 7602 For the purpose of ascertaining the correctness of any return, . . . determining the liability of any person for any internal revenue tax, . . . or collecting any such liability the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data, which may be relevant or material to such inquiry;

(2) To summon the person liable for tax, . . . or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . .

§ 7604 (a) If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court . . . shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

§ 7605 (b) No taxpayer shall be subjected to unnecessary examination or investigations . . . .

STATEMENT OF THE CASE

Petitioners Stephen M. Orr and Craig E. Davis

(hereinafter referred to as Orr and Davis) are attorneys practicing in the same law firm in Austin, Texas. In April 1978 this case began when IRS Special Agent Edmond J. Martin began gathering information and documents regarding their client, Robert M. Howard, a person suspected by the IRS, DEA, and other law enforcement agencies to be involved with marijuana importation or distribution. (III-R. 5). Agent Martin, however, did not begin a "formal investigation" of Howard until August 23, 1978. (III-R. 15-16).

The IRS, on September 5, 1978, served Davis with a summons requiring his testimony and production of virtually all his records regarding Howard, including his workpapers related to the preparation of Howard's tax returns. (III-R. 4). On December 26, 1978, Howard was required to appear at the IRS offices pursuant to a summons he received, which apparently was similar to the summons later issued to Orr. (II-R. 47). Howard appeared with Orr as his attorney, but refused to produce any documents or answer any questions, asserting his Fifth Amendment rights. (II-R. 48). On February 23, 1979, Orr was served with a lengthy IRS summons requesting his testimony and his production of documents regarding Howard. (I-R. 2,5,6).

Both Orr and Davis have refused to testify or to produce documents asserting that their testimony and production of documents would violate the attorney-client privilege and further would require production of their work product. Additionally, Orr refused to comply with the summons because he felt his testimony or production of documents might tend to incriminate Howard.

At separate hearings, the District Court enforced the summonses to Davis and Orr in their entirety. Al-

though discovery was requested in Orr's case, he was allowed none prior to trial. The Court of Appeals for the Fifth Circut, writing only on the issues of production of documents affirmed the District Court's judgment in Davis. In Orr, the Fifth Circuit affirmed virtually all aspects of the District Court's judgment, vacated and remanded for further hearing with respect to a few documents, and reversed the holding that Orr should produce Howard's will. No documents have been produced by Orr or Davis at any time. The decisions of the District Court and the Court of Appeals were made without any knowledge of the actual contents of any documents.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals For The Fifth Circuit Has Rendered A Decision Which Is In Direct Conflict With The Court Of Appeals For The Second Circuit.

The Fifth Circuit, in holding that the summons regarding papers in possession of Davis should be enforced in its entirety stated that it

> would make little sense to permit a taxpayer to invoke a privilege merely because he hires an attorney to [prepare tax returns].

United States v. Davis, 636 F.2d 1028, 1043 (5th Cir. 1981). This proposition is erroneous in general, and under the facts of this case such a principle, if carried to its logical extent, would prevent all taxpayers from having any confidential communications with an attorney with respect to the preparation of tax returns. Further, it is in direct conflict with *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

Davis and Orr are law partners, as the lower court noted. *Davis*, at 1033. It is clear from the entire record that Orr has represented the taxpayer, Howard, for a much longer time and in a greater variety of ways than Davis. The taxpayer in this case, as shown by the testimony of both Orr and Davis, had sought legal advice from Orr in regard to both civil and criminal cases and from Davis primarily in regard to preparing his tax returns. It is apparent that the taxpayer had retained *Orr's law firm* to represent him. Further, it can be easily inferred that during the course of his representations by Orr, Howard was assisted by Davis in the preparation of his tax returns for the years in question. It is also apparent from the record that Howard, the client, felt that he was consulting with an attorney, not an accountant. (III—R. 40).

To state that communications with Davis, an attorney in the same law firm as Orr, are not privileged because his representation primarily involved preparing tax returns makes little sense. Such a holding effectively destroys the ability of a taxpayer to have any confidential communications regarding the preparation of his tax returns. When a lawyer primarily responsible for representing a particular client feels that his partner, associate or employee can render more effective advice regarding the preparation of a client's tax return, the first lawyer, after the Fifth Circuit's decision, can no longer send the client down the hall to the second lawyer without destroying the attorney-client relationship.

Even though unnecessary to the ultimate holding in this case, the Court of Appeals held that

> [c]ommunications relating to [preparation of tax returns] should . . . not be privileged, even

though performed by a lawyer.

Id. at 1043. The court cited *Olendar v. United States*, 210 F.2d 795 (9th Cir. 1954) and *Canady v. United States*, 354 F.2d 849 (8th Cir. 1966) as support for this holding. Neither of these cases have anything to do with enforcement of an IRS summons and both cases are factually far different from this case.

In *Olendar*, a criminal tax case, the question was whether the testimony of Ringo, an attorney/accountant was admissible at Olendar's criminal trial. The Court held that Ringo's testimony was admissible and his communications with Olendar were not privileged since Ringo had functioned solely as an accountant. In contrast to the taxpayer in this case, however, Olendar

> on advice of a friend went to an *accounting firm* to secure the services of Ringo, who was a member of the firm...

Olendar, 210 F.2d at 806. [Emphasis added.] Davis was a member of a law firm and never held himself out as an accountant. (T. 40, 50-51). Nothing in the record of either the Orr or Davis case indicates that Howard, the taxpayer, sought the services of Davis as an accountant. In *Olendar* the Court reasoned that since Ringo was a member of an accounting firm and functioned solely as an accountant, being an attorney

> did not make the transaction one in which [Olendar] sought legal advice from a lawyer *in his capacity as such.*

Olendar, 210 F.2d, at 806. [Emphasis added]. The only capacity in which Davis could have been seen was as a

lawyer. He functioned solely as a lawyer, and he did not see Howard in any other capacity. (T. 50-51).

Canady, another criminal case in which the defendant was charged with tax evasion is likewise inapposite. Canady, the defendant, had hired an attorney, C. O. Smith to prepare his tax returns. Smith was called as a Government witness in the case against Canady and *voluntarily* released documents and agreed to testify. After a hearing the trial court allowed Smith's testimony, and this decision was affirmed in connection with Canady's appeal of his conviction. Here Davis has strongly opposed divulging any documents or testimony regarding his client. Moreover, Davis's function was more than a mere scrivener. His testimony was that the *primary* work he had done for Howard was preparing tax returns. The record is silent regarding any other advice Howard may have sought or that Davis may have given. Again it must be reemphasized that Howard had sought legal advice from Davis *and* Orr, both lawyers, and both in the same law firm.

In reaching its decision regarding preparation of tax returns, the Court of Appeals disagreed with *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963), a case which dealt specifically with the issuance of an IRS summons to an attorney who had prepared tax returns for the taxpayers being investigated. In *Colton* the Court held that

> [t]here can, of course, be no question that the giving of tax advice and the preparation of tax returns — which unquestionably constituted a very substantial part of the legal services rendered . . . by the Colton firm—are basically matters sufficiently within the professional compe-

> tence of an attorney to make them prima facie subject to the attorney-client privilege.

Colton, 306 F.2d, at 637. *Colton* is far more analgous to this case than any other cited by the court below. The reasoning and procedure in *Colton* make much more sense than saying that Howard loses all confidentiality regarding the preparation of his taxes merely by walking from the office of Orr to that of Davis.

Indeed, many courts have held that the attorney-client privilege applies to accountants and other third parties who have been hired by an attorney after an investigation has begun. *See Federal Trade Commission v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980); *United States v. Cote*, 456 F.2d 142 (8th Cir. 1972); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). *Colton*, *Cote* or *Kovel* do not appear to have been directly or implicitly overruled by *Couch v. United States*, 409 U.S. 322 (1973), as the Fifth Circuit has implied. Here we have an attorney, Davis whose testimony is uncontradicted regarding his attorney-client relationship with Howard, and yet the court below has refused to follow the above cases.

The record is unclear as to what records are in Davis's possession. The case should be remanded to allow both sides to develop fully a record regarding the exact type of documents in Davis's possession. The attorney-client privilege has long been recognized as a necessity to promote and encourage totally frank communications between the lawyer and client. *Upjohn Co. v. United States*, ___ U.S. ___, 101 S.Ct. 677 (1981); *Trammel v. United States*, 445 U.S. 40 (1980). *Upjohn* was never mentioned in the opinion of the Court of Appeals.

There are any number of reasons a taxpayer, especially one such as Howard is suspected to have been, may desire to consult an attorney rather than an accountant to assist in preparing tax returns. One of the most logical reasons is that the oral and written information given to an attorney will be confidential. In this case it is clear that when Howard sought advice from Davis, he sought confidential legal advice from a lawyer. The lower court has now decided that Howard received no legal advice, regardless of what he and his attorneys may have thought at the time. This Court should grant the petition for writ of certiorari in order to resolve the conflict between the lower courts, and further to decide a substantial question of law which appears to be undecided in the federal courts.

II. This Court Should Grant The Writ And Remand This Case To The District Court For Further Proceedings.

Both Orr and Davis made blanket assertions that the documents in their possession should not be subject to production because of the attorney-client privilege and the work product doctrine. These blanket assertions were made in good faith since they were attempting to avoid incriminating their client, or implicity authenticating documents. As the court below stated

> . . . *Fisher* recognized that compelled production of documents has some testimonial aspects; by compliance, the summonee concedes the existence of and his possession of the papers demanded, as well as his belief that the papers are those described in the summons.

United States v. Davis, 636 F.2d at 1041.

Fisher v. United States, 425 U.S. 391 (1976), [hereinafter referred to as *Fisher*] was factually unlike this case for numerous reasons. First, the IRS agents had visited the taxpayers in *Fisher*, with the taxpayers then obtaining documents from their accountants and then delivering them to their attorneys. In this case there was no evidence to indicate that the IRS had reason to believe the attorneys had any specific documents. Moreover, there was no evidence of any recent delivery of documents to Orr or Davis.

Second, the documents demanded in *Fisher* did not belong to the taxpayers or their attorneys. The documents were all those of their accountants, and "[t]he existence and location of the papers [were] a foregone conclusion . . . ." *Fisher*, 425 U.S., at 412. Here the documents for the most part belonged to either Davis, Orr, or the taxpayer. Indeed, all documents in Davis's possession were his alone. (III— R. 42,54). The existence and location of the documents in possession of the attorneys were unknown to anyone but the attorneys or their client at the time the summonses were issued. Petitioners objected to answering any questions regarding the existence or location of any documents because to do so would tacitly violate the attorney-client privilege, and in doing so, infringe on their client's Fifth Amendment privilege. (II—R. 57-61). Petitioners sincerely felt their actions were appropriate. *See generally Maness v. Meyers*, 419 U.S. 449 (1975).

As this Court has indicated, the

> . . . questions [of whether tacit averments of a person are testimonial or incriminating under the Fifth Amendment] do not lend themselves to categorial answers; their resolution may instead de-

> pend on the facts and circumstances of particular cases or or classes thereof.

Fisher, 425 U.S., at 411. Since the facts of this case are significantly different than *Fisher*, blanket assertions of privilege and work product were appropriate in this case. The claims of privilege therefore should have been examined on a document by document basis. *See United States v. Johnson*, 465 F.2d 703 (5th Cir. 1972); *United States v. Long*, 328 F.Supp. 233 (E.D. Mo. 1971).

If this Court holds that the blanket claims of privilege were improper, such claims were nevertheless made in good faith. Petitioners should not be forced to comply almost fully with the documentary summonses when they legitimately were attempting to protect their client. There is no evidence in the record in this case to indicate the nature or the contents of the documents in Petitioners' possession. No documents were ever produced. In making its decision the lower court assumed that the summoned documents were exactly as described in the IRS summonses. The records included in the summonses are shown in the footnotes of the opinion below. *United States v. Davis*, 636 F.2d, at 1032-34, n. 2,3.

The Court of Appeals has effectively ordered Orr and Davis to divulge to the IRS certain categorized documents regarding Howard and the corporations he allegedly controls to the IRS without any possible notion of what is actually contained on any given document. In doing so the court below totally ignored *Upjohn Co. v. United States*, ___ U.S. ___, 101 S. Ct. 677 (1981), [hereinafter referred to as *Upjohn*]. Although the Government will argue that *Upjohn* only applies to large, multi-level corporate summonses, such is not, or should not be the case.

The reaffirmation by this Court in *Upjohn* of the attorney-client privilege as necessary to encourage frank and total communication between the lawyer and client applies to lawyers representing those suspected of distributing marijuana as well as lawyers representing corporations suspected of making illegal payments to foreign officials. More importantly, the work product doctrine now applies to IRS summon enforcement proceedings.

The Court of Appeals incorrectly held that Davis was not functioning as a lawyer in assisting Howard in the preparation of his tax returns. Thus, if this petition is denied, Davis will be required to disclose to the IRS documents which the lower court determined could not be work product, even though no documents were before it. The court below held that

> Davis's workpapers were to aid in preparing tax returns, not primarily to help litigate over those returns. They are therefore outside the scope of the work product doctrine.

United States v. Davis, 636 F.2d, at 1040. There is no evidence whatsoever to show the primary reason for the preparation of his notes and workpapers. Davis's testimony regarding his work product was as follows:

> Q. Mr. Davis, did you prepare any workpapers and stuff in connection with Mr. Howard's income tax return?
>
> A. Well, I'm sure I prepared—I did some writing other than what's on the return itself, if that's what you mean. Maybe drafts.

A. Any worksheets or any notes that you made in terms of preparing the return? Do you have any memoranda besides from the returns themselves?

A. Well, sure, yes.

(III—R. 51).

Davis had not looked at his file on Howard "in a long time." (III—R. 53), and therefore was unsure of exactly what his workpapers contained. He stated that Howard's "tax returns were derived, at least in part, from some writings from Mr. Howard. Part of them may have been verbal." (III—R. 50). How the Court of Appeals can conclusively state that Davis's workpapers were not work product without seeing them is incredible.

The only testimony in the record about the documents in Orr's possession is the testimony of Orr. His uncontroverted statements as Howard's attorney indicate that some of the documents in his possession are protected by the attorney-client privilege, some are his work product, and some are testimonial and incriminating with respect to Howard. (II—R. 53-56). Nevertheless, Orr never testified about the nature or contents of any specific document or group of documents.

The Court of Appeals has remanded Orr's case to determine whether Items 9 or 12 of the IRS summons (shown in footnote 3 of the opinion below) fall within the attorney-client privilege. These documents have been defined as "preexisting records of business operations and financial statements . . .". *United States v. Davis*, 636 F.2d, at 1044. This definition was derived by the

lower court's reading the summons and attempting to lump all records summoned into three broad categories. This analysis cannot be valid since the lower court assumed that the documents could be categorized without having any evidence of the contents or nature of the documents.

The material listed in Items 5,6,7,8 and 10 is very likely to contain Orr's work product and is therefore not subject to an IRS summons under *Upjohn*. For example the documents in these categories may include Orr's own records prepared in connection with his representation of Howard or his corporations in lawsuits involving real estate, banking, probate, various loans, contingent fee cases, or innumerable hypotheticals that can be taken from a mere reading of the summons.

Moreover, it is likely that the documents demanded in Items 5,6,7,8 and 10 overlap with the documents listed in Items 9 and 12. All these documents may contain preexisting business records created by Howard. They may relate to Howard's personal affairs, and they may have been written under the immediate supervision of Howard. Furthermore, they may be incriminating, as Orr stated. If so, the documents should be privileged by the Fifth Circuit's holding that

> . . . any incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, rather than in a representative capacity, and which he himself wrote or which were written under his immediate supervision, are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process, regardless of whether they are business related or more inherently personal in content.

United States v. Davis, 636 F.2d, at 1043 [Footnotes omitted].

Many of the documents described in Items 1-8 and 10 could be documents or such categories could contain documents that were created as communications to Orr from Howard or from Howard to Orr regarding legal advice. They would therefore not be subject to summons under *Fisher v. United States*, 425 U.S. 391 (1976).

It is impossible for this Court, the Court of Appeals, or the District Court to determine abstractly whether the specific documents in possession of Orr and Davis are protected from an IRS summons. This Court should therefore grant the petition for writ of certiorari in order to remand the case for further proceedings, if this Court feels that Orr and Davis must produce any documents.

III. This Court Should Decide Whether A Lawyer Can Ever Assert The Fifth Amendment Privilege On Behalf Of A Client.

The Court of Appeals held that Petitioners' attempts to raise their client's Fifth Amendment privilege "is squarely forbidden by *Couch v. United States*, 1973, 409 U.S. 322 . . .." *United States v. Davis*, 636 F.2d, at 1039. This holding conflicts with *In Re Michaelson*, 511 F.2d 882 (9th Cir. 1975), *cert. denied*, 421 U.S. 978 (1975), and, further, this question was specifically left open in this Court's decision in *Fisher v. United States, supra.*

In *Fisher* this Court stated that

> [i]n [Kasmir], the taxpayer did not intervene, and his rights have been asserted only

> through his lawyer. The parties disagree on the question whether an attorney may claim the Fifth Amendment privilege of his client. We need not resolve this question....

Fisher, 425 U.S., at 403 n. 8.

Orr and his firm have represented Howard or his corporations for many years, but the record is clear that Orr was the lawyer who primarily was responsible for advising Howard. Orr currently represents Howard in the criminal investigations being conducted by the IRS, the DEA, and other law enforcement agencies. (II—R. 49,50,72). Orr appeared with Howard before IRS Agent Martin prior to receiving his own summons, where Howard refused to answer questions or produce documents, asserting his Fifth Amendment privilege. The IRS now is attempting to obtain the same or similar information from Howard's attorney that it could not obtain from Howard.

The question of a lawyer's right to refuse to produce documents or testimony which might incriminate a client should be resolved. The Fifth Circuit and the Ninth Circuit appear to be in conflict on this issue.

IV. The Burden Of Proof Should Be On The Government In A Proceeding To Enforce An IRS Summons.

In *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), this Court indicated that in order for an IRS summons issued to a third party to be enforced: (1) the summons must be issued prior to an IRS recommendation to the Department of Justice that a criminal prosecution of the taxpayer in question be undertaken; and (2) the IRS must be using its summons authority

in a good faith attempt to carry out the purpose of 26 U.S.C. § 7602. In *LaSalle* this Court held that it is *only after the Government meets its burden of showing good faith* that the burden shifts to the party opposing the summons to show that to enforce the summons would be an abuse of the judicial process or that the summons was issued in bad faith or for other improper purposes.

The lower court in this case has stated that the Government can meet its burden of proof and thus shift the burden to the person summoned

> by a simple affidavit filed with the petition to enforce by the agent who issued the summons . . ..

United States v. Davis, 636 F.2d, at 1034.

This Court has never held that the Government can meet its burden merely by filing the petition to enforce and attaching an affidavit of the agent who has issued the summons. The Court should grant the petition for writ of certiorari in order to make clear whether the burden shifts to a party opposing an IRS summons the moment the lawsuit is filed.

V. This Court Should Grant The Writ In This Case To Determine Whether A Person Opposing The Enforcement Of An IRS Summons Is Entitled To Discovery.

A brief review of the record on appeal in this case will show that Orr had clearly requested discovery prior to the hearing in his case, during the hearing in his case, and after the hearing in his case. The District Court never specifically allowed Orr any discovery of the documents, which he had requested for inspection or copying,

and the Court of Appeals has erred in holding that Orr never clearly demanded the discovery essential to his case.

> Due process should require an evidentiary hearing with sufficient taxpayer discovery to disclose any existing evidence indicating lack of good faith or government failure to meet the *Powell* criteria for proper purpose.

Note, DISCOVERY IN THE IRS SUMMONS ENFORCEMENT PROCEEDING; LESS CERTAIN THAN DEATH AND TAXES, 31 U. FLA. L. REV. 321, 354 (1979).

If the Court holds that the Government's burden is met merely by filing the affidavit of an IRS agent under this Court's decision in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), it will be impossible to resist an IRS summons without some limited pre-hearing discovery. Orr had requested discovery in this case, not by requesting depositions of numerous IRS special agents, but by the least intrusive method possible, a request for production of documents. Production of the IRS documents for inspection and copying is essential

> since examination represents the most expedient and trustworthy method of determining the institutional purpose of the IRS. Because a deposition of the special agent who issued the summons is of limited value under *LaSalle*, the taxpayer will inevitably look to a more direct method of uncovering purpose and thereby demonstrating a lack of good faith. Although the interrogatory might provide the same information, IRS documents seem preferable and, if produced in a timely manner,

> more expedient. Such documents would undoubtedly be more reliable because information could easily be omitted on an interrogatory.

Note, *supra*, 31 U. FLA. L. REV.. at 348-49 (1979).

The question of whether pre-hearing discovery should be allowed in IRS enforcement proceedings should be reviewed by this Court in order that lower courts and future litigants in IRS summons enforcement proceedings will be able to determine the proper methods to use for discovery. Since this Court has indicated in *Upjohn* that the normal rules of discovery in civil cases are applicable to IRS summons enforcement proceedings, the writ should be granted in order to remand this case and allow Petitioners the necessary discovery and a new hearing.

CONCLUSION

Wherefore, for all the foregoing reasons, Petitioners Craig E. Davis and Stephen M. Orr respectfully pray that their petition for writ of certiorari be granted in order for this Court to review the judgments and opinion of the United States of Appeals for the Fifth Circuit.

Respectfully submitted

CHARLES O. GRIGSON
305 Stewart Title Bldg.,
812 San Antonio
Austin, Texas 78701
512/477-5791
ATTORNEY FOR PETITIONERS
CRAIG E. DAVIS and
STEPHEN M. ORR.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing instrument has been served on Mr. Wade Hampton McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530; Mr. Edward C. Prado, United States Attorney, 655 E. Durango Blvd., San Antonio, Texas 78205; and Mr. Michael A. Paup, Assistant Attorney General, Tax Division, Department of Justice, Washington, D.C. 20530 by United States Mail, postage pre-paid on the 15th day of July, 1981.

Charles O. Grigson

CHARLES O. GRIGSON

APPENDIX A

UNITED STATES of America and Edmond J. Martin, Special Agent, Internal Revenue Service, Plaintiffs-Appellees,

v.

Craig E. DAVIS, Defendant-Appellant.

UNITED STATES of America and Edmond Martin, Special Agent, Plaintiffs-Appellees,

v.

Stephen M. ORR, Defendant-Appellant.

Nos. 79-2630, 80-1015.

United States Court of Appeals,
Fifth Circuit.
Unit A

Feb. 12, 1981.

Attorneys appealed from separate judgments of the United States District Court for the Western District of Texas, at Austin, Jack Roberts, J., enforcing summonses issued by Internal Revenue Service that required each to produce documents and give testimony relating to income tax liability of their client. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) there was no clear error in finding of district court that attorney did not meet his burden of demonstrating that IRS investigation of his client or IRS summons was based on fruits of search made under unsigned warrant; (2) summons described documents with sufficient particularity to inform attorney which ones should be produced; (3) district court's finding that IRS had civil purpose for issuing each summons was not clearly erroneous; (4) it was not error for district court to enforce summons in its entirety despite contention that IRS already possessed some of the information requested; (5) attorneys could not assert their client's Fifth Amendment privilege vicariously; (6) summoned documents were not within work product doctrine; (7) communications relating to preparation of client's tax returns and tax records upon which they were based were not privileged; (8) financial transactions between attorney and client, documents establishing trust funds and federal and state tax returns and other reports filed with the Government were not privileged; and (9) enforcement was not proper as to at least three items in one summons.

Affirmed in part, reversed in part and vacated and remanded in part.

1. Internal Revenue ⇐1456, 1460

Government need not meet any standard of probable cause to obtain enforcement of Internal Revenue Service summons, but need make merely preliminary showing that investigation will be conducted pursuant to legitimate purpose, that inquiry may be relevant to that purpose, that information sought is not already within Commissioner's possession, and that administrative steps required by Internal Revenue Code have been followed; this showing may be made by simple affidavit filed with petition to enforce by agent who issued summons. 26 U.S.C.A. §§ 7402(b), 7604.

2. Internal Revenue ⇐1456, 1460

Once government has satisfied minimum requirements for enforceability of Internal Revenue Service summons, burden shifts to summonee either to disprove one element of government's prima facie showing or to demonstrate that judicial enforcement of summons would other-

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wise constitute abuse of court's process. 26 U.S.C.A. §§ 7402(b), 7604.

3. Internal Revenue ⇐1460

There as no clear error in finding of district court that attorney did not meet his burden of demonstrating that Internal Revenue Service investigation of his client or IRS summons was based on fruits of search made under unsigned warrant, since documents obtained by IRS from that search were sealed and never used.

4. Federal Courts ⇐612

Because contention that Internal Revenue Service summons was unenforceably vague was not raised before trial court, it need not have been considered on appeal in absence of the exceptional circumstances resulting in a miscarriage of justice.

5. Internal Revenue ⇐1460

Internal Revenue Service summons requiring attorney to produce documents and give testimony relating to income tax liability of their client described documents with sufficient particularity to inform attorney which ones should be produced. 26 U.S.C.A. §§ 7402(b), 7604.

6. Internal Revenue ⇐1451

Internal Revenue Service summonses may not be enforced if issued solely to gather information for criminal prosecution. 26 U.S.C.A. §§ 7402(b), 7604.

7. Internal Revenue ⇐1460

Despite indicia of criminal purpose offered by attorneys, there was no clear error in district court's finding that Internal Revenue Service had civil purpose for issuing summonses requiring attorneys to produce documents and give testimony relating to income tax liability of their client, especially where IRS had not made recommendation for criminal prosecution to Department of Justice and special agent conducting investigation had not recommended criminal proceedings to his superiors. 26 U.S.C.A. §§ 7402(b), 7604.

8. Internal Revenue ⇐1460

Affidavits accompanying Government's petitions to enforce Internal Revenue Service summonses and denying that IRS possessed any summoned information were sufficient to shift to summonees burden of showing, at a minimum, actual possession of information by IRS and, since they never made motion for further discovery of small proportion of documents which government may have possessed, and did not move for partial denial of enforcement, it was not error for district court to reject blanket argument against enforcement. 26 U.S.C.A. §§ 7402(b), 7604.

9. Grand Jury ⇐36.2

Grand jury is not absolutely prohibited from subpoenaing documents that contain information already in its possession. Fed.Rules Cr.Proc. Rule 17(c), 18 U.S.C.A.

10. Internal Revenue ⇐1451

Need to permit effective investigation or need to expedite summons enforcement proceedings may justify Internal Revenue Service summoning information it already possesses. 26 U.S.C.A. §§ 7602, 7604(b), 7605(b); Fed.Rules Cr. Proc. Rule 17(c), 18 U.S.C.A.

11. Internal Revenue ⇐1455

When Internal Revenue Service summons as a whole is not harassing, when bulk of materials summoned is not demonstrably in possession of IRS, and

where marginal burden of supplying information which might already be in possession of IRS is small, enforcement of IRS summons in its entirety is not an "unnecessary examination or inspection" within meaning of statute forbidding "unnecessary" summonses. 26 U.S.C.A. § 7605(b).

12. Internal Revenue ⇐1456, 1460

Generally, recipient of Internal Revenue Service summons should properly appear before issuing agent and claim privileges on question-by-question and document-by-document basis. 26 U.S.C.A. §§ 7402(b), 7604.

13. Internal Revenue ⇐1453, 1458

Claims of privilege with respect to documents may be asserted in proceedings to enforce Internal Revenue Service summons; but privilege is not a defense to enforcement of summons to testify; rather, such claims are tested by refusing to answer specific questions after enforcement and defending subsequent contempt proceeding. 26 U.S.C.A. §§ 7402(b), 7604.

14. Internal Revenue ⇐1460

Attorneys could not assert their client's Fifth Amendment privilege vicariously against Internal Revenue Service summons requiring them to produce documents and give testimony relating to income tax liability of their client, since summonees did not contend that production of papers summoned would in any way incriminate attorneys and papers were not constructively within client's possession. 26 U.S.C.A. §§ 7402(b), 7604; U.S.C.A.Const. Amend. 5.

15. Internal Revenue ⇐1459

Documents summoned by Internal Revenue Service were not within work product doctrine, as "materials prepared by an attorney acting for his client in anticipation of litigation," since some documents were business records prepared by client, rather than by or on behalf of his attorneys, and of documents prepared by attorneys, none were even colorably prepared in anticipation of litigation. 26 U.S.C.A. §§ 7402(b), 7604.

16. Witnesses ⇐204(2)

Papers generated by attorney who prepares tax return are not within work product privilege simply because there is always possibility that Internal Revenue Service might challenge given return.

17. Witnesses ⇐204(2)

Litigation need not necessarily be imminent to protect documents prepared by attorneys in anticipation thereof to be within work-product doctrine, as long as primary motivating purpose behind creation of document was to aid in possible future litigation.

18. Witnesses ⇐204(2)

Documents created outside attorney-client relationship should not be held privileged in hands of attorney unless otherwise privileged in hands of client, lest client immunize incriminating evidence merely by depositing it with his attorney.

19. Witnesses ⇐297(1)

Privilege against self-incrimination exists only when individual is compelled to affirm truth of statement which incriminates him. U.S.C.A.Const. Amend. 5.

20. Witnesses ⇐298

Any incriminating papers in actual or constructive possession of individual,

which he holds in his individual capacity and which he himself wrote or were written under his immediate supervision, are absolutely protected from production by subpoena or equivalent process, regardless of whether they are business-related or more inherently personal in nature. U.S.C.A.Const. Amend. 5.

21. Witnesses ⇐204(2)

Preexisting documents and documents created in course of attorney-client relationship must fall within common-law standards for attorney-client privilege to be protected.

22. Witnesses ⇐219(1)

Disclosure of any significant portion of confidential communication waived privilege as to the whole.

23. Witnesses ⇐200

Although preparation of tax return by itself may require some knowledge of the law, it is primarily an accounting service, and therefore, communications relating to that service should not be privileged, even though performed by a lawyer.

24. Witnesses ⇐200

Accounting services performed ancillary to legal advice may be within attorney-client privilege, such as where taxpayer's attorney has amended tax returns prepared after Internal Revenue Service investigation into originals has begun.

25. Witnesses ⇐201(1)

Financial transactions between attorney and client, including compensation paid by or on behalf of client, are not within attorney-client privilege except in special circumstances.

26. Witnesses ⇐200

Attorney who acts as his client's business advisor, or his agent for receipt or disbursement of money or property to or from third party is not acting in legal capacity, and records of such transactions are not privileged.

27. Witnesses ⇐200

Documents establishing trust funds are not privileged because in their creation attorney acts merely as scrivener.

28. Witnesses ⇐204(2)

Federal and state tax returns and other reports filed with government are not confidential communications and hence are not protected by attorney-client privilege.

29. Witnesses ⇐204(2)

Client's will was protected by attorney-client privilege.

30. Witnesses ⇐223

Blanket assertions of privilege before district court are usually unacceptable.

31. Witnesses ⇐298

If preexisting records of business operations and financial statements of client and corporation controlled by client were in client's possession, any of those documents which he held in representative capacity for corporation could not be privileged under Fifth Amendment; but documents relating to client's own affairs would be privileged. U.S.C.A.Const. Amend. 5.

Appeals from the United States District Court for the Western District of Texas.

Before WISDOM, AINSWORTH and GEE, Circuit Judges.

WISDOM, Circuit Judge:

These two cases involve the validity of two civil investigative summonses issued by the Internal Revenue Service (IRS) under 26 U.S.C. § 7602. Craig Davis and Stephen Orr, the summonees, appeal from separate judgments enforcing summonses that require each to produce documents and give testimony relating to the income tax liability of their client, Robert M. Howard, for the years 1974 through 1977. We agree with the result the district court reached in most of its rulings but we disagree with the court's analysis of the attorney-client privilege as applied to Davis and Orr. We affirm in part, reverse in part, and vacate and remand in part.

I.

The events leading up to these appeals are not seriously disputed. On April 12, 1978, IRS Special Agent Edmond Martin began gathering information about narcotics traffic in Austin, Texas, to determine whether those engaged in such illicit commerce had a least paid their just tax on income derived from that activity. From the beginning, Robert Howard figured prominently in the investigation. Parallel investigations into Texas drug traffic were simultaneously being conducted by the Federal Drug Enforcement Administration and the Attorney General of the State of Texas. From William Fargo, a member of the Texas Attorney General's office, Martin obtained information tending to implicate Howard in marijuana smuggling, and in August 1978, Fargo corroborated earlier reports that Howard controlled a corporation which owned a 79-foot yacht. Because Howard reported little or no income on his income tax returns for the years 1972 through 1976, Martin not surprisingly surmised that if those rumors had a factual basis, Howard might have had substantial unreported income in those years. The IRS therefore began a formal tax investigation of Howard on August 23.

On September 1 Fargo informed Martin that Howard had just been arrested on a drug charge and that contraband and documents had been seized in a search of Howard's residence under a search warrant. Martin accepted Fargo's invitation to inspect the documents, and made photographic and microfilm copies of some of them. Following standard IRS procedure,[1] Martin delivered the copies to his supervisor, who sealed them pending internal review of the validity of the search. Because the search warrant, by oversight, had not been signed by the issuing magistrate, the copies have remained sealed.

Agent Martin next tried to further the investigation by what has become a familiar IRS tactic: issuing summonses to the taxpayer's attorneys and accountants. On September 5, a summons was issued to Davis, an attorney and certified public accountant who had prepared Howard's tax returns for several of the years in question. The summons required Davis to produce and testify as to two categories of documents.[2] First, he was to

1. *See* Handbook for Special Agents ¶ 383.(13), in 6 Internal Revenue Manual—Administration (CCH) ¶ 9781 (1980); 5 *Id.* at ¶ 9451.2(3).

2. The terms of Davis's summons require him to give testimony relating to Howard's tax liability and to produce the following documents in regard to Howard and various corporations in which Howard participated:

1. Cash receipts and disbursements journals, general ledgers, subsidiary ledgers,

bring all records in his possession of financial transactions by Howard or corporations in which Howard had participated for the years 1974 through 1978. Second, he was to produce the workpapers he had generated in the course of preparing Howard's tax returns for those years. At Howard's request, Davis refused to comply with any part of the summons, citing the attorney-client privilege as justification. The government filed a petition under 26 U.S.C. § 7604 to enforce the summons. After an evidentiary hearing at which Davis's counsel had an opportunity to cross-examine Martin and Fargo extensively, the district court issued an order granting the government's petition in full.

While the proceeding to enforce the summons issued to Davis was pending, the government issued two more summonses. One was issued to Howard himself. Howard appeared at Agent Martin's office in compliance with that summons on December 26, 1978, with his counsel, Orr, but did not produce any documents or answer any questions, asserting his fifth amendment privilege against self-incrimination. The government has not sought judicial enforcement of that summons, and it is not in issue in this appeal. The other summons, however, was issued to Orr, one of Davis's law partners. Orr has represented and continues to represent Howard in several criminal proceedings; Orr had represented Howard in the two earlier summons proceedings until Orr was himself summoned. The summons to Orr, issued on February 23, 1979, required him to produce fourteen categories of documents, falling into three broad classes: [3] (1) Orr's

check stubs, cancelled checks, deposit tickets, bank statements, deposit and withdrawal slips, records of stock purchased and sold, records of loans, records of real estate purchased and sold, records of rental income, records of assets bought and sold (including but not limited to vehicles, airplanes and boats), records of accounts payable and receivable, records of notes payable and receivable, records of inventory, financial statements, corporate minute records of inventory, financial statements, corporate minute books, corporate stock books, and any other documents necessary to compute a correct tax liability for the above periods.

2. Accountants' workpapers, analysis of records, schedules, correspondence, retained copies of drafts of federal income tax returns and any other documents regarding the preparation of income tax returns for ROBERT M. HOWARD and the other above-listed names during the period 1974 through 1978.

3. Orr's summons requires him to produce the following documents pertaining to Howard, Poseidon Investments, Inc., and other enterprises:

1. Records of any loans made by you to the above-designated subjects during the period January 1, 1972 through December 31, 1977, such loan records to include, but not limited to, the following information:

a. Date of the loan.
b. Amount of the loan.
c. Form in which the loan was made.
d. Purpose of the loan.
e. When the loan was repaid.
f. Form in which the loan was repaid.
g. Amounts and dates of repayment.

2. Records of any loans made by the above-designated subjects to you during the period January 1, 1972 through December 31, 1977, such loan records to include, but not limited, to the following information:

a. When the loan was made.
b. Amount of the loan.
c. Form in which the loan was made.
d. Purpose of the loan.
e. When the loan was repaid.
f. Form in which the loan was repaid.
g. Amounts and date of any and all repayments.

3. Records of any cash gifts made during the above noted period by you to the above-designated subjects, such records to include, but not limited to, the following:

records of financial transactions between Orr and Howard, including loans, gifts, and compensation to Orr; (2) Orr's records of financial transactions between Howard and third parties, including records of the disbursement of funds to others by Orr's law firm on Howard's behalf, and records of activities in which the law firm had assisted Howard in acquiring or disposing of money and property; (3) business records created by Howard or corporations controlled by Howard in Orr's possession. Orr, like Davis, made a blanket assertion of privilege and refused to comply with any part of the summons. The government petitioned for enforce-

a. Amount of the cash gift.
b. When the cash gift was made.
c. Identity of individual or individuals present when the gift was made.
4. Records of any cash gifts made to you during the above noted period by the above-designated subjects, such records to include, but not limited to, the following:
a. Amount of the cash gift.
b. Date of the cash gift to you.
c. Identity of individual or individuals present when the gift was made.
5. Records showing the dates and amounts of any money or property received by you or placed under your custody or control, or received by or placed under the custody or control of a member of your law firm for or on behalf of the above-designated subjects during the period January 1, 1972 through December 31, 1977.
6. Records showing the dates and amounts of any disbursements of money or property made by you, or made at your direction, or made by or at the direction of a member of your law firm, for or on behalf of the above-designated subjects during the period January 1, 1972 through December 31, 1977.
7. Records of any real or personal property you or your law firm assisted the above-designated subjects in acquiring, holding or disposing of during the period January 1, 1972 through December 31, 1977, such records to include but not limited to the following:
a. Stocks, bonds, certificates of deposit, cashier checks, money orders or other securities.
b. Loans made by the above-designated subjects to others than yourself.
c. Loans made to the above-designated subjects.
d. Real estate.
e. Airplanes, boats, yachts, automobiles and/or other personal property.
f. Bank checking or savings accounts.
g. Escrow accounts or funds.
8. Records pertaining to the establishment and maintenance or other transactions with any trust fund related to the above-designated subjects, such records to include but not limited to the following:
a. Establishment and maintenance of the trust.
b. Funds and properties flowing into and out of the trust.
c. Federal and state income or other tax returns or reports prepared and/or filed.
d. Accounting records.
9. Records pertaining to any business operations of the above-designated subjects, during the period January 1, 1972 through December 31, 1977 including, but not limited to such records as lease agreements, purchase agreements, sales agreements, mortgages, notes payable, notes receivable, accounts receivable, accounts payable, and accounting records for income, expenses, assets and liabilities of such business.
10. Records showing the dates and amounts of all compensation paid to you or paid to your law firm by the above-designated subjects during the period January 1, 1972 through December 31, 1977.
11. Records, including the final draft, pertaining to any will and/or codicils of ROBERT MORRIS HOWARD prepared and/or maintained by you or your law firm.
12. Records pertaining to any summaries of financial activities and the financial situation of the above-designated subjects during the period January 1, 1971 through December 31, 1977, including but not limited to income statements, balance sheets or other financial statements.
13. Retained originals or copies of any Federal or state income tax returns of the above-designated subjects.
14. Retained copies or originals of any other state or Federal reports or forms including but not limited to franchise tax returns, sales tax returns, and/or personal property inventories of the above-designated subjects.

ment and after a second evidentiary hearing the district court granted the petition.

Davis and Orr separately obtained stays and each appealed. They advance overlapping arguments against enforcement of their summonses.

II.

[1, 2] Both Davis and Orr assert that the government failed to meet the standards laid down in *United States v. Powell*, 1964, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112, for enforceability if IRS summonses under 26 U.S.C. §§ 7402(b), 7604. Under *Powell*, the government need not meet any standard of probable cause to obtain enforcement, but need make merely a preliminary showing that

> the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed. . . .

379 U.S. at 57–58, 85 S.Ct. at 254. This showing may be made by a simple affidavit filed with the petition to enforce by the agent who issued the summons, as was done in this case. *United States v. McCarthy*, 3 Cir. 1975, 514 F.2d 368, 372; *United States v. Garden State National Bank*, 3 Cir. 1979, 607 F.2d 61. Once the government has satisfied this minimal requirement, the burden shifts to the summonee either to disprove one of the four elements of the government's prima facie showing or to demonstrate that judicial enforcement of the summons would otherwise constitute an abuse of the court's process. *United States v. Powell*, 379 U.S. at 58, 85 S.Ct. at 255. *See generally* Kenerdine, *The Internal Revenue Service Summons to Produce Documents: Powers, Procedures, and Taxpayer Defenses*, 64 Minn.L.Rev. 73 (1979); Note, *The Institutional Bad Faith Defense to the Enforcement of IRS Summonses*, 80 Colum. L.Rev. 621 (1980).

A.

[3] Several of the appellants' arguments may be dismissed with a minimum of discussion. Davis argues both that the summons issued to him was based on information obtained in the search of Howard's residence and, more generally, that the entire IRS investigation resulted from information obtained in that search. Since the search was made under an unsigned warrant, he argues that his summons is a tainted fruit of an unlawful search. We need not consider the merits of this argument as a matter of law.[4] The district court specifically found that

4. We question whether Davis and Orr have standing to raise this claim, since the allegedly illegal search of Howard's residence did not violate *their* fourth amendment rights. *See Rakas v. Illinois*, 1978, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387. Furthermore, even if Howard had intervened in this enforcement action, as he undoubtedly had a right to do under 26 U.S.C. § 7609, and raised such a claim, we question whether it would be legally sufficient to defeat the summonses. As noted in the text of this opinion, the Supreme Court has frequently construed IRS summons procedure by analogy to grand jury subpoenas; and the fourth amendment does not prohibit a grand jury from using evidence seized during the course of an illegal search. *United States v. Calandra*, 1974, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561. The facts of this case make it unnecessary for us to consider the possibility that the statutes authorizing IRS summonses might be more restrictive in this respect than the fourth amendment requires. *Cf. Gelbard v. United States*, 1972, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179; *United States v. Serubo*, 3 Cir. 1979, 604 F.2d 807, 814.

Davis did not meet his burden of demonstrating that the investigation or the summons was based on the fruits of the search. That finding is not clearly erroneous. Since the documents obtained by the IRS from that search were sealed and never used, they cannot be a source of taint. Martin admitted that while he was making copies of the seized documents he noticed the names of certain corporations presumably owned or controlled by Howard, but the evidence is that long before then those names and relationships were known to the IRS.

[4, 5] Nor is there merit to Davis's contention that the summons issued to him was unenforceably vague. Because he did not raise this contention before the trial court, it need not be considered on appeal in the absence of exceptional circumstances resulting in a miscarriage of justice. *D. H. Overmyer Co. v. Loflin*, 5 Cir. 1971, 440 F.2d 1213, 1215–16, *cert. denied*, 1971, 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90. In any case, we find that the summons issued here described the documents with sufficient particularity to inform Davis which ones should be produced. *In re Grand Jury Proceedings (McCloy and Sussman)*, 5 Cir. 1979, 601 F.2d 162, 168; *United States v. Malnik*, 5 Cir. 1974, 489 F.2d 682, 686 n.4, *cert. denied*, 1974, 419 U.S. 826, 95 S.Ct. 44, 42 L.Ed.2d 50.[5]

B.

Both Davis and Orr contend that the sole institutional purpose of the IRS in issuing the summonses was to aid future criminal prosecutions against Howard. Notwithstanding that IRS has not made a recommendation for criminal prosecution to the Department of Justice and that agent Martin has not recommended criminal proceedings to his superiors, appellants offer the following as indicia of criminal purpose: the investigation was initiated by Martin, a Special Agent and therefore a member of the IRS's criminal investigation arm; Martin himself was admittedly concerned only with criminal investigation; and the revenue agent assigned to the case has to date played a purely passive role.[6] They also point to the cooperation between the IRS and state and federal drug enforcement agencies and to the IRS's attempt to summon certain of Howard's bank records from Davis and Orr rather than directly from his bank; and they allege that the IRS deliberately delayed recommending prosecution to the Department of Justice to gather more information through these summonses.

[6] In *United States v. LaSalle National Bank*, 1978, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221, and *Donaldson v. United States*, 1971, 400 U.S. 517, 91 S.Ct.

5. Orr argues that he was not allowed adequate discovery. This Court thoroughly analyzed the scope of required discovery in IRS summons enforcement proceedings recently in *United States v. Harris*, 5 Cir. 1980, 628 F.2d 875. Prehearing discovery is never required. After a hearing at which the issuing agent may be cross-examined, further discovery is within the discretion of the district court. Although Orr made prehearing requests for prehearing production of documents and issued subpoenas duces tecum to Martin and Fargo which were not complied with in full, he was given full opportunity to examine Martin and Fargo, and he did not clearly move for further discovery at the hearing. We need express no opinion on whether he should have been given any further discovery if it had been clearly demanded.

6. "Special agents" are members of the Criminal Enforcement Division of the IRS. Civil tax assessment is the province of the Examinations Division; its agents are known as "revenue agents."

534, 27 L.Ed.2d 580, the Supreme Court established that IRS summonses may not be enforced if issued solely to gather information for a criminal prosecution. Information gathering via summons after a case is actually referred to the Department of Justice for prosecution necessarily infringes on the role of the grand jury as the principal tool of federal criminal investigation. *LaSalle* recognized that the same evidence will generally support either civil or criminal tax proceedings, however, and the Court did not choose to let mere potential infringement on the function of the grand jury limit the use of summonses for civil tax investigation even if criminal proceedings were also contemplated. *LaSalle* therefore held that summonses issued before referral are invalid only if the IRS has abandoned the pursuit of immediate civil tax collection "in an institutional sense", as "where there is an institutional commitment to make the referral and the Service merely would like to gather evidence for the prosecution." 437 U.S. at 318, 98 S.Ct. at 2368; *id.* at 317, 98 S.Ct. at 2368. Since the decision to refer usually takes place in the upper echelons of the IRS hierarchy after several layers of review, such an institutional abandonment would require an extraordinary departure from established procedures. 437 U.S. 314–16, 98 S.Ct. at 2366. This Court has therefore recognized that before the investigating agent completes his investigation or makes a recommendation for criminal prosecution, summonses are "virtually unassailable." *United States v. Harris*, 5 Cir. 1980, 628 F.2d 875, 882, *quoting United States v. Genser*, 3 Cir. 1979, 595 F.2d 146, 151, *cert. denied*, 1979, 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185.

[7] The question of institutional purpose is one of fact. *United States v. First National Bank of Atlanta*, 5 Cir. 1980, 628 F.2d 871, 874. Here the district court found that the IRS had a civil purpose for issuing each summons. None of the factors identified by the appellants persuade us that this finding is clearly erroneous. There is no direct evidence that Martin's superiors have determined against a prompt civil action against Howard for collection of back taxes—the ultimate test of the IRS's institutional posture. The fact that the summonses were issued and the investigation is primarily being carried out by a special agent is of little significance. *Couch v. United States*, 1973, 409 U.S. 322, 326, 93 S.Ct. 611, 614, 34 L.Ed.2d 548; *United States v. Amerada Hess Corp.*, 3 Cir. 1980, 619 F.2d 980, 985; *United States v. Garden State National Bank*, 3 Cir. 1979, 607 F.2d 61, 65. So too is intent of the agent who issued the summons. *United States v. LaSalle National Bank*, 1978, 437 U.S. 298, 316, 98 S.Ct. 2357, 2367, 57 L.Ed.2d 221. Although *LaSalle* indicates that unreasonable delay in recommending prosecution could show improper purpose, the record does not show unreasonable delay by Martin or his superiors. *Cf. United States v. Chase Manhattan Bank*, 2 Cir. 1979, 598 F.2d 321; *United States v. O'Henry's Film Works, Inc.*, 2 Cir. 1979, 598 F.2d 313, 320. Finally, appellants cite no case, and we have found none, which suggests that the IRS's use of information obtained from other government agencies or its effort to summons bank records from parties other than the issuing bank bears in any way on its institutional purpose. The IRS can use information wherever it finds it.[7]

7. We note that there is no evidence that the IRS transmitted any information to the Drug Enforcement Administration in return, or that the summonses were directly inspired by the

C.

[8] Both Davis and Orr contend that their summonses should not be enforced because the IRS already possesses some of the information requested by the summonses. The affidavits accompanying the government's petitions to enforce the summonses deny that the IRS possesses any of the summoned information. These assertions are sufficient to shift to the summonees the burden of showing, at a minimum, "actual possession of the information by the IRS." *United States v. Garrett*, 5 Cir. 1978, 571 F.2d 1323, 1328. The only evidence demonstrating that the government possesses any of the summoned information is Martin's admission during cross-examination at the enforcement hearing on the Orr summons that he had already received from a local bank "some" bank records that were also requested from Orr.[8] Since those records constituted only a small proportion of the documents requested by the summons, this admission would at most have been grounds for limiting enforcement of the summons to those documents not already in the IRS's possession, rather than completely denying enforcement. Orr should have requested further discovery on this point and specifically moved for partial denial of enforcement. Since Orr never clearly made such a motion, it was not error for the district court to reject his blanket argument against enforcement.

Even if Orr had specifically preserved the point, however, we hold that it would not have been error for the district court to enforce the summons in its entirety. The "already possessed by government" defense originated in the passage of *United States v. Powell* quoted above, for which the Supreme Court cited no authority. *Powell* construed not only the implicit prerequisites to enforceability of a summons issued under 26 U.S.C. §§ 7602, 7604(b), but also the explicit limitation contained in 26 U.S.C. § 7605(b), which forbids "unnecessary" summonses. Read in context, we construe the "already possessed" principle enunciated by *Powell* as a gloss on § 7605(b)'s prohibition of "unnecessary" summonses, rather than an absolute prohibition against the enforcement of any summons to the extent that it requests the production of information already in the possession of the IRS.

[9] This balancing approach is supported by analogy to the principles governing the enforcement of grand jury subpoenas. The Supreme Court has frequently made reference to such an analogy in interpreting the scope of the IRS's summons power. *See, e. g., United States v. Euge*, 1980, 444 U.S. 707, 710, 100 S.Ct. 874, 877, 63 L.Ed.2d 141; *United States v. Powell*, 1964, 379 U.S. 48, 57,

DEA; nor were IRS agents acting under the supervision of a joint task force attorney. *Cf. United States v. Serubo*, 3 Cir. 1979, 604 F.2d 807. Such cooperation between the IRS and other agencies may taint the institutional purpose of the IRS in issuing a summons, but not where communication between the agencies is strictly one way, as was apparently the case here. *Cf. United States v. LaSalle National Bank*, 1978, 437 U.S. 298, 317, 98 S.Ct. 2357, 2367, 57 L.Ed.2d 221 ("the good-faith standard will not permit the IRS to become an information-gathering agency for other departments . . ."). *See generally* Note, *The Institutional Bad Faith Defense to the Enforcement of IRS Summonses*, 80 Colum.L.Rev. 621, 631–37 (1980); Fink, *Internal Revenue Service Summons Power*, 38 N.Y.U.Inst.Fed.Tax. § 19.03[2] (1980).

8. The appellants also assert that some of the documents seized in the search of Howard's residence and copied by Martin are identical with the records sought by the summonses, but nothing in the record so indicates.

85 S.Ct. 248, 254, 13 L.Ed.2d 112. But a grand jury is not absolutely prohibited from subpoenaing documents that contain information already in its possession. Its subpoenas will be enforced so long as they are not, on balance, "unreasonable or oppressive". Fed.R.Crim.P. 17(c). *See In re grand Jury Subpoenas Duces Tecum (M. G. Allen & Associates, Inc.)*, D.R.I. 1975, 391 F.Supp. 991, 1001–02; *In re Columbia Broadcasting System, Inc.*, S.D. N.Y.1964, 235 F.Supp. 684, 688–89. *See generally* 8 Moore's Federal Practice ¶ 17.11 (2d ed. 1980).

[10] In practice, *Powell's* possession defense has been so applied. For example, in *United States v. Schwartz*, 5 Cir. 1972, 469 F.2d 977, 985, this Court held that where reference would have to be made to voluminous corporate records to locate summoned information, the IRS should not be deemed to be in possession of the information even though an IRS agent had access to inspect the information. Similarly, in *United States v. First National State Bank of New Jersey*, 3 Cir. 1980, 616 F.2d 668, 673–74, *cert. denied*, 1980, — U.S. —, 100 S.Ct. 2987, 64 L.Ed.2d 854, the court enforced a summons against a third-party recordkeeper for copies of certain tax forms previously filed with the IRS because the total number of such forms in the possession of the IRS made it impracticable to retrieve those filed by any individual. Though both of these courts chose to cast their argument in terms of whether the information was effectively in the government's "possession", this terminology should not obscure their essential analysis. In both opinions the courts recognized that actual possession of or access to information by the IRS is not an absolute bar to enforcement of a summons for that information. In both the courts balanced the government's need for effective investigation against the potential for unnecessary harassment inherent in such summonses, and enforced such summonses even though compliance would impose nontrivial costs on the summonee.[9]

[11] Just as the need to permit effective investigation may justify the IRS summoning information it already possesses, so should the need to expedite summons enforcement proceedings. Enforcement proceedings are essentially summary in nature. *Donaldson v. United States*, 1971, 400 U.S. 517, 529, 91 S.Ct. 534, 546, 27 L.Ed.2d 580. It is inconsistent with the scheme of summary enforcement to permit a person summoned to delay the process by the detailed discovery, prolonged cross-examination, and possible *in camera* inspection necessary to sort out a relatively small number of documents, the contents of which may already be known to the IRS, when it is probable that the person summoned has no substantial interest in anything but the delay itself. When a summons as a whole is not harassing, when the bulk of the materials summoned is not demonstrably in the possession of the IRS, and where the marginal burden of supplying information which might already be in the possession of the IRS is small, as was the case here, enforcement of the summons in its entirety is not an "unnecessary examination or inspection" within

9. *See also United States v. Davey*, 2 Cir. 1976, 543 F.2d 996, 1000; *United States v. Theodore*, 4 Cir. 1973, 479 F.2d 749, 755; *United States v. Lenon*, 7 Cir. 1978, 579 F.2d 420, 422. In light of *United States v. Pritchard*, 5 Cir. 1971, 438 F.2d 969, however, we question whether this Court would have struck the balance between government convenience and potential for harassment in the same way the Seventh Circuit did on the facts of *Lenon*.

the meaning of § 7605(b). The "already possessed" rule should be limited to such cases as *United States v. Pritchard*, 5 Cir. 1971, 438 F.2d 969, where a revenue agent had informally examined the taxpayer's records at length and later sought to force their production without any explanation of why the opportunity for informal examination was insufficient. It is not a license to trim the edges of an otherwise valid summons.

III.

In addition to trying to disprove the prima facie enforceability of the summonses issued to them, Davis and Orr made blanket assertions concerning the attorney-client privilege, the work product doctrine, and their client's fifth amendment privilege, all of which the district court rejected. Appellants urge us to pass on all their claims of documentary privilege now and to require the government to submit its questions to the district court in advance to screen them through their claims of privilege. The government, by contrast, suggests that the summonses should have been enforced without considering any claims of privilege; it argues that all claims of privilege should be asserted on a document-by-document or question-by-question basis before the summoning officer after enforcement, who may then test the claims of privilege by instituting contempt proceedings.

[12, 13] It is generally agreed that the recipient of a summons should properly appear before the issuing agent and claim privileges on a question-by-question and document-by-document basis. *United States v. Malnik*, 5 Cir. 1974, 489 F.2d 682, 685, *cert. denied*, 1974, 419 U.S. 826, 95 S.Ct. 44, 42 L.Ed.2d 50; *United States v. Roundtree*, 5 Cir. 1969, 420 F.2d 845, 852. But if the summonee and the agent disagree on the validity of a specific claim of privilege, or if the summonee makes a blanket claim of privilege before the agent, there is a split of authority on when that claim should be judicially resolved. Some courts apparently accept the government position and do not pass on claims of privilege at all at the enforcement stage. *E. g. Russell v. United States*, 8 Cir. 1975, 524 F.2d 1152; *United States v. Theep*, 9 Cir. 1974, 502 F.2d 797. In this circuit, the division of responsibility between the initial enforcement proceeding and later contempt proceedings for passing on claims of privilege has evolved otherwise. Claims of privilege with respect to documents may be asserted in enforcement proceedings. But privilege is not a defense to enforcement of a summons to testify; such claims are tested by refusing to answer specific questions after enforcement and defending the subsequent contempt proceeding. *United States v. Hankins*, 5 Cir. 1978, 565 F.2d 1344, *clarified*, 581 F.2d 431, *cert. denied*, 1979, 440 U.S. 909, 99 S.Ct. 1218, 59 L.Ed.2d 457; *United States v. Malnik*, 5 Cir. 1974, 489 F.2d 682, *cert. denied*, 1974, 419 U.S. 826, 95 S.Ct. 44, 42 L.Ed.2d 50; *United States v. Johnson*, 5 Cir. 1972, 465 F.2d 793. *See also Reisman v. Caplin*, 1964, 375 U.S. 440, 449, 84 S.Ct. 508, 513, 11 L.Ed.2d 459. We therefore proceed to consider the validity of the appellants' claims of privilege with respect to the summoned documents.

A.

[14] Two of those claims are without merit. Appellants' attempt to assert their client's fifth amendment privilege vicariously is squarely forbidden by *Couch v. United States*, 1973, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548. *See*

also Fisher v. United States, 1976, 425 U.S. 391, 397–98, 96 S.Ct. 1569, 1574, 48 L.Ed.2d 39. *Couch* ruled that "the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not the information that may incriminate him". 409 U.S. at 328, 93 S.Ct. at 616. The papers summoned here are within the physical possession of Davis and Orr, but the summonees do not contend that their production will in any way incriminate themselves. Hence here, as in *Couch*, "the ingredient of personal compulsion against an accused is lacking". 409 U.S. at 329, 93 S.Ct. at 616. Nor can the papers be said to be constructively within Howard's possession, even as to those owned by him. All the summoned documents have undisputedly been in the appellants' physical possession for months or years, and the appellants were not mere custodial bailees who made no use of the documents and had no knowledge of their contents. *See Couch v. United States*, 409 U.S. at 333–35, 93 S.Ct. at 619; *United States v. Jones*, 5 Cir. 1980, 630 F.2d 1073.

[15–17] The summonees' attempt to bring the summoned documents within the work product doctrine is similarly meritless. Without pausing to resolve the debate over whether the work product doctrine can ever apply in IRS summons proceedings,[10] it is plain here that none of the summoned documents were "materials prepared by an attorney 'acting for his client in anticipation of litigation' ". *United States v. Nobles*, 1975, 422 U.S. 225, 237–38, 95 S.Ct. 2160, 2169, 45 L.Ed.2d 141, *quoting Hickman v. Taylor*, 1947, 329 U.S. 495, 508, 67 S.Ct. 385, 392, 91 L.Ed. 451. A large proportion of the summoned documents are business records prepared by the client, rather than by or on behalf of his lawyers. Of the documents prepared by the attorneys themselves, none were even colorably prepared in anticipation of this or any other litigation—except for the workpapers created by Davis in the course of preparing Howard's tax returns for the years 1974 through 1978. But papers generated by an attorney who prepares a tax return are not within the work product privilege simply because there is always a possibility that the IRS might challenge a given return. *See Colton v. United States*, 2 Cir. 1962, 306 F.2d 633, 639–40, *cert. denied*, 1963, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499. It is admittedly difficult to reduce to a neat general formula the relationship between prepa-

10. Two circuits hold that the work product doctrine does apply in summons proceedings. *See United States v. Amerada Hess Corp.*, 3 Cir. 1980, 619 F.2d 980, 987–88; *United States v. Brown*, 7 Cir. 1973, 478 F.2d 1038, 1040–41; *see also United States v. Bonnell*, D.Minn.1979, 483 F.Supp. 1070, 1078–79. One clearly holds that it does not. *United States v. Upjohn Co.*, 6 Cir. 1979, 600 F.2d 1223, 1228 n.13, *cert. granted*, 1980, 445 U.S. 925, 100 S.Ct. 1310, 63 L.Ed.2d 758. Precedent in the Fifth Circuit is less than definitive. A strong dictum in *United States v. McKay*, 5 Cir. 1967, 372 F.2d 174, 176, doubts that the privilege can apply, while dictum in *United States v. Hankins*, 5 Cir. 1980, 632 F.2d 894, assumes that it can. *See also United States v. Lipshy*, N.D.Tex.1979, 492 F.Supp. 35. To the extent that the analogy between an IRS summons and a grand jury subpoena holds true, note that it is uniformly held that the work product doctrine applies to grand jury proceedings. The seminal case is *In re Grand Jury Proceedings*, 8 Cir. 1973, 473 F.2d 840. *See also In re Grand Jury Subpoena*, 6 Cir. 1980, 622 F.2d 933, 935; *In re Grand Jury Investigation*, 3 Cir. 1979, 599 F.2d 1224, 1228; *In re Grand Jury Subpoena*, 2 Cir. 1979, 599 F.2d 504, 509; *Velsicol Chemical Corp. v. Parsons*, 7 Cir. 1977, 561 F.2d 671, 679, *cert. denied*, 1978, 435 U.S. 942, 98 S.Ct. 1521, 55 L.Ed.2d 538. *Cf. United States v. Nobles*, 1975, 422 U.S. 225, 247 n.6, 95 S.Ct. 2160, 2174, n.6, 45 L.Ed.2d 141 (White, J., concurring).

ration of a document and possible litigation necessary to trigger the protection of the work product doctrine. *See Kent Corp. v. N. L. R. B.*, 5 Cir. 1976, 530 F.2d 612, 623, *cert. denied*, 1976, 429 U.S. 920, 97 S.Ct. 316, 50 L.Ed.2d 287; *In re Grand Jury Investigation (United States)*, 3 Cir. 1979, 599 F.2d 1224, 1229. We conclude that litigation need not necessarily be imminent, as some courts have suggested, *see, e. g., Home Insurance Co. v. Ballenger Corp.*, N.D.Ga.1977, 74 F.R.D. 93, 101; *In re Grand Jury Investigation (Joseph B. Sturgis)*, E.D.Pa.1976, 412 F.Supp. 943, 948, as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation. *See Osterneck v. E. T. Barwick Industries, Inc.*, N.D.Ga.1979, 82 F.R.D. 81, 87, *citing* 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, at 198 (1970). But there is no evidence that Davis had reason to expect future trouble with the IRS. Davis's workpapers were to aid in preparing tax returns, not primarily to help litigate over those returns. They are therefore outside the scope of the work product doctrine.

B.

Finally, both Davis and Orr contend that the requested documents are protected by the attorney-client privilege. The district court properly looked to *Fisher v. United States*, 1976, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39, to provide the structure for analysis of this contention. *Fisher* involved an attempt by the IRS to summon from a taxpayer's attorney work papers produced by the independent accountant who had prepared the tax returns. The Court held that pre-existing documents transferred to an attorney are protected by the attorney-client privilege only if two conditions are met. First, the usual common-law prerequisites for the privilege must be satisfied: the information in the documents must be confidential and the transfer must have been made to obtain legal advice. Second, the documents must have been privileged from production in the client's hands, either at common law or under the Fifth Amendment. In *Fisher*, as in this case, the only potentially applicable privilege derives from the fifth amendment. The district court here applied this two-pronged test to all of the summoned documents. Without examining them, the court found that none could reflect "testimonial communications" by Howard, and held that in consequence Howard could not have successfully asserted the fifth amendment privilege as to any of them had he retained them. The court therefore concluded that none of the documents were protected by the attorney-client privilege.

[18] The district court's analysis was erroneous in two ways. First, the second prong of the *Fisher* test—that the documents be privileged in the client's hands—need not be satisfied for every document before an attorney-client privilege should be recognized as to it, but only for documents delivered by the client to the attorney which were not themselves created as communications to the attorney. Following Professor Wigmore, *Fisher* reasoned that to permit individuals to obtain fully informed legal advice, it is necessary to permit them to transfer relevant documents to their attorneys without losing any evidentiary privileges the documents might possess in their own hands. At the same time, documents created outside the attorney-client relationship should not be held privileged in the hands of the attorney unless otherwise privileged in the hands of the client, lest the client immunize

incriminating evidence merely by depositing it with his attorney. This reasoning applies only to what *Fisher* loosely termed "preexisting" documents—in Wigmore's more precise formulation, documents that did not come into existence as communications from the client to the attorney. 8 J. Wigmore, Evidence § 2307, at 599 (McNaughton rev.1961). Letters from the client to the attorney seeking legal advice, for example, and all documents created by the attorney that are within the normal ambit of the common-law attorney-client privilege therefore need not be tested for privilege in the client's hands.

[19] Second, the district court's ruling that none of the summoned documents could have been privileged in Howard's hands was too broad, even as applied only to preexisting documents transferred by Howard to his attorneys. In interpreting the fifth amendment self-incrimination clause as applied to compelled production of documents and other tangibles, the Supreme Court has constructed two basic frameworks for analysis.[11] *Fisher* itself exemplifies one analysis: the privilege exists only when an individual "is compelled to make a testimonial communication that is incriminating"—that is, only when the individual is compelled to affirm the truth of a statement which incriminates him. *Fisher v. United States*, 1976, 425 U.S. 391, 408, 96 S.Ct. 1569, 1579, 48 L.Ed.2d 39. Compliance with a documentary summons does not require affirmance of the truth of any representations made on the documents; hence, "the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate" the summonee. *Id.* at 409, 96 S.Ct. at 1580. To be sure, *Fisher* recognized that compelled production of documents has some testimonial aspects; by compliance, the summonee concedes the existence of and his possession of the papers demanded as well as his belief that the papers are those described in the summons. But *Fisher* held that the former aspect should be ignored as de minimis when, as in this case, there is no question as to the existence and location of the papers. *Id.* at 411–12, 96 S.Ct. at 1581; *cf. In re Katz*, 2 Cir. 1980, 623 F.2d 122. As to the latter aspect, both *Fisher* and our decision in *United States v. Authement*, 5 Cir. 1979, 607 F.2d 1129, 1131–32, imply that it should not be a ground for refusing to produce the documents as long as the fact of compliance with the summons is not introduced into evidence at the incriminated party's trial.[12] Under this analysis, none of the preexisting documents summoned here would have been privileged in Howard's hands, and hence none would be protected by the attorney-client privilege while in his attorney's hands.

Yet other Supreme Court decisions suggest that in addition to creating the

11. *See generally*, Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 Harv.L.Rev. 945 (1977).

12. Courts have differed over how to deal with the tacit authentication resulting from the summonee's implied affirmation that the papers delivered are the papers demanded. At least one court has suggested that it might justify complete refusal to comply with the summons. *In re Katz*, 2 Cir. 1980, 623 F.2d 122, 125–26. Some seem to ignore it entirely. *United States v. Praetorius*, 2 Cir. 1980, 622 F.2d 1054, 1062–63; *United States v. Osborne*, 9 Cir. 1979, 561 F.2d 1334, 1339. One Court rejects our *Authement* principle as tantamount to a "judicial grant of immunity without statutory authorization", but permits compelled production as long as the government grants immunity against use of the fact of compliance. *In re Grand Jury Proceedings (United States)*, 1 Cir. 1980, 626 F.2d 1051, 1057–58.

above protection, the fifth amendment creates a zone of privacy which absolutely protects documents from production by summons or subpoena as long as they are in the hands of the owner. Indeed, this was the premise of *Boyd v. United States*, 1886, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, the fountainhead of modern analysis of the self-incrimination clause. Though certain features of the case have been overruled, its core perception—"that the seizure of a man's private books and papers to be used in evidence against him" is not "substantially different from compelling him to be a witness against himself"— has been persistently reiterated, in dicta at least, up to the present day. *Id.* at 633, 6 S.Ct. at 534. *See, e. g., Bellis v. United States*, 1974, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678; *Couch v. United States*, 1973, 409 U.S. 322, 330, 93 S.Ct. 611, 616, 34 L.Ed.2d 548; *Schmerber v. California*, 1966, 384 U.S. 757, 763–64, 86 S.Ct. 1826, 1831, 16 L.Ed.2d 908. The only major limitation on that principle ever accepted by the Court was to forbid its assertion by artificial entities and individuals acting as their representatives. *E. g., Bellis v. United States*, 1974, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678; *United States v. White*, 1944, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542.

These two branches of Fifth Amendment analysis are not logically exclusive of each other. Nothing in *Fisher* suggests otherwise; the Court expressly found that the accountant's workpapers summoned there were not the taxpayer's papers and hence were outside the absolute protection of the *Boyd* principle even if in the taxpayer's hands. 425 U.S. at 414, 96 S.Ct. at 1582. Historically, the two tests have coexisted. The rule that the Fifth Amendment does not protect against the compulsion of nontestimonial acts is almost as old as *Boyd* itself. *See Holt v. United States*, 1910, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021. In recent years, however, a dispute has arisen over the scope of the *Boyd* zone of protection for private papers. At least one court, impressed with the apparent anomaly of protecting the records of a business enterprise carried on by a proprietorship but not those of a corporation, partnership, or other artificial entity, has sought to draw content-based distinctions between "business" and "personal" papers, extending *Boyd's* protection only to the latter. *In re Grand Jury Proceedings (United States)*, 1 Cir. 1980, 626 F.2d 1051, 1054 n.2. *See also Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv.L.Rev. 1227, 1281–83 (1979). Support for this distinction might be found in *Andresen v. Maryland*, 1976, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627, which, in upholding a seizure of documents under a warrant, repeatedly stressed that the documents seized were business documents. 427 U.S. at 471, 474, 475, 477, 96 S.Ct. at 2743, 2745, 2746. Indeed, if *Andresen* does not draw such a distinction, arguably it altogether abolished the *Boyd* principle sub silentio, for its Fifth Amendment analysis looked solely to the existence of compelled testimonial communication. It is difficult to find a logical reason for applying the *Boyd* principle to subpoenaed documents and not documents taken in a search, as in *Andresen*. *See Andresen v. Maryland*, 1976, 427 U.S. 463, 484–92, 96 S.Ct. 2737, 2750, 49 L.Ed.2d 627 (Brennan, J., dissenting). The government asks us to embrace one or the other of these views.

[20] This Court, however, has already rejected interpretations of *Fisher* and *Andresen* that would either limit the *Boyd* principle to non-business records or

abolish it altogether. *In re Grand Jury Proceedings (McCloy and Sussman)*, 5 Cir. 1979, 601 F.2d 162; *In re Oswalt*, 5 Cir. 1979, 607 F.2d 645; *United States v. Hankins*, 5 Cir. 1978, 565 F.2d 1344, *clarified*, 581 F.2d 431, *cert. denied*, 1979, 440 U.S. 909, 99 S.Ct. 1218, 59 L.Ed.2d 457. However illogically, these cases by implication limit *Andresen* to documents taken in a search. *See I.C.C. v. Gould*, 3 Cir. 1980, 629 F.2d 847; *In re Grand Jury Investigation (Nino v. Tinari)*, 3 Cir. 1980, 631 F.2d 17; *United States v. Helina*, 9 Cir. 1977, 549 F.2d 713, 716 (dictum). *See also* Matz & Wilson, *Obtaining Evidence for Federal Investigative Crime Prosecutions: An Overview and Analysis of Investigative Methods*, 14 Am.Crim.L.Rev. 717, 661–670 (1977). We are bound by these cases. Their cumulative teaching is that any incriminating papers in the actual or constructive possession of an individual,[13] which he holds in his individual capacity, rather than in a representative capacity,[14] and which he himself wrote or which were written under his immediate supervision,[15] are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process,[16] regardless of whether they are business-related or more inherently personal in content. The district court's ruling that none of the summoned papers could be protected by the self-incrimination clause from production from Howard's hands was therefore incorrect.

[21–24] Nevertheless, many of the documents summoned here cannot be within the attorney-client privilege. Both preexisting documents and documents created in the course of the attorney-client relationship must fall within the common-law standards for attorney-client privilege to be protected under the *Fisher* test. But that privilege extends only to *legal* advice given by a lawyer. The summons to Davis requests the workpapers he produced in the course of preparing Howard's tax returns and the tax records upon which they were based. Neither category of documents is privileged, because although preparation of tax returns by itself may require some knowledge of the law, it is primarily an accounting service.[17] Communications relating to that service should therefore not be privileged, even though performed by a lawyer. *Olender v. United States*, 9 Cir. 1954, 210 F.2d 795, 805–06; *Canaday v. United States*, 8 Cir. 1966, 354 F.2d 849, 857. Some courts have suggested, to the contrary, that tax return preparation

13. *See Couch v. United States*, 1973, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548; *United States v. Jones*, 5 Cir. 1980, 630 F.2d 1073.

14. *See Bellis v. United States*, 1974, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678; *United States v. White*, 1944, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed.2d 1542.

15. *See Fisher v. United States*, 1976, 425 U.S. 391, 414, 96 S.Ct. 1569, 1582, 48 L.Ed.2d 39; *United States v. Beattie*, 2 Cir. 1976, 541 F.2d 329.

16. "Equivalent process" includes IRS summonses, and, in general, any procedure which forces an individual to make any testimonial communication on pain of contempt. *See I.C.C. v. Gould*, 3 Cir. 1980, 629 F.2d 847, 860–61. It does not include search warrants. *Andresen v. Maryland*, 1976, 427 U.S. 463.

17. Accounting services performed ancillary to legal advice may be within the attorney-client privilege. *United States v. Kovel*, 2 Cir. 1961, 296 F.2d 918. *See also Federal Trade Commission v. TRW, Inc.*, D.C.Cir.1980, 628 F.2d 207. Preparation of tax returns may in some circumstances come within this category, as where a taxpayer's attorney has amended tax returns prepared after an IRS investigation into the originals has begun. *See United States v. Cote*, 8 Cir. 1977, 456 F.2d 142. This is not such a case. *See generally* 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 503(a)(1)[01] (1980).

and tax advice is sufficiently "legal" in nature to trigger the privilege. *See Colton v. United States*, 2 Cir. 1962, 306 F.2d 633, 637, *cert. denied*, 1963, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499; *see also* Peterson, *Attorney-Client Privilege in Internal Revenue Service Investigations*, 54 Minn.L.Rev. 67, 91–97 (1969). These services, however, are typically performed by accountants, and since there is no accountant-client privilege under federal law, there is no doubt that the papers summoned here would not be privileged if Howard had had a professional accountant prepare his returns. *Couch v. United States*, 1973, 409 U.S. 322, 335, 93 S.Ct. 611, 619, 34 L.Ed.2d 548; *Falsone v. United States*, 5 Cir. 1953, 205 F.2d 734, *cert. denied*, 1953, 346 U.S. 864, 74 S.Ct. 103, 98 L.Ed. 375. It would make little sense to permit a taxpayer to invoke a privilege merely because he hires an attorney to perform the same task.[18] The summons to Davis must therefore be enforced in its entirety.

[25–28] Many of the documents summoned from Orr similarly must relate to matters other than the giving of legal advice, and hence are outside the attorney-client privilege as well. Financial transactions between the attorney and client, including the compensation paid by or on behalf of the client (Items 1–4, 10 of the Orr summons) are not within the privilege except in special circumstances not present here. *United States v. Finley*, 5 Cir. 1970, 434 F.2d 596, 597; *In re Grand Jury Proceedings (United States v. Jones)*, 5 Cir. 1975, 517 F.2d 666; *In re Walsh*, 7 Cir. 1980, 623 F.2d 489, 494–95; *see also* 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 503(a)(4)[02], at 503-32 n.1 (1980). An attorney who acts as his client's business advisor, or his agent for receipt or disbursement of money or property to or from third parties (Items 5, 6, 7, 8), is not acting in a legal capacity, and records of such transactions are not privileged.[19] *Colton v. United States*, 2 Cir. 1962, 306 F.2d 633, 638, *cert. denied*, 1963, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499; *Pollock v. United States*, 5 Cir. 1953, 202 F.2d 281, 285–86, *cert. denied*, 1953, 345 U.S. 993, 73 S.Ct. 1133, 97 L.Ed. 1401. Federal and state tax returns and other reports filed with the government (Items 13, 14) are not confidential communications and hence are not privileged. *Colton v. United States*, 306 F.2d at 638. The summons to Orr was therefore properly enforced as to these items.

[29–31] On the record before us, however, enforcement is not proper as to at least three items in the Orr summons. The government concedes that Howard's will (Item 11) is privileged, and the district court's order enforcing the summons is therefore reversed to that extent.

18. In any case, *Colton* noted that since part of the information that passes between the attorney-accountant and client will be disclosed on the tax returns directly or indirectly, that part at least is not a confidential communication and hence is not privileged. 306 F.2d at 638. But disclosure of any significant portion of a confidential communication waives the privilege as to the whole. *United States v. Cote*, 8 Cir. 1972, 456 F.2d 142, 144–45; 8 J. Wigmore, Evidence § 2327, at 638 (McNaughton rev. 1961).

19. This reasoning applies to item 8(b). Items 8(c) and 8(d) are unprivileged for other reasons set forth in the text. Documents establishing trust funds, requested by item 8(a), are not privileged because in their creation the attorney acts merely as a scrivener. *See Pollock v. United States*, 202 F.2d at 286; *Canaday v. United States*, 8 Cir. 1966, 354 F.2d 849, 857; 8 J. Wigmore, Evidence § 2297 (McNaughton rev. 1961).

Further proceedings are necessary to determine whether Items 9 and 12—preexisting records of business operations and financial statements of Howard and Poseidon Investments, Inc., a corporation controlled by Howard—are privileged or not.[20] It is possible that some of those documents satisfy both prongs of the *Fisher* test. If those documents were in Howard's possession, any which he held in a representative capacity for Poseidon could not, of course, be privileged under the Fifth Amendment, and the summons should be enforced as to such documents. But any documents relating to the Howard's own affairs would be within the *Boyd* principle. As to those documents, the record does not disclose the purpose of and circumstances surrounding their transfer from Howard to Orr. If the information contained in those documents is confidential and the transfer was made for the purpose of obtaining legal advice, they will be privileged in Orr's hands. We therefore vacate that part of the district court's order enforcing Items 9 and 12 of the Orr summons and remand for further proceedings, including an *in camera* inspection of the documents to the extent the district court considers it appropriate. *See United States v. Johnson*, 5 Cir. 1972, 465 F.2d 793.

The order enforcing the summons to Davis, No. 79-2630, is AFFIRMED. The order enforcing the summons to Orr, No. 80-1015, is AFFIRMED IN PART, REVERSED IN PART, AND VACATED AND REMANDED IN PART.

20. Blanket assertions of privilege before a district court are usually unacceptable. *United States v. Hodgson*, 10 Cir. 1974, 492 F.2d 1175, 1177; *United States v. Roundtree*, 5 Cir. 1969, 420 F.2d 845, 852. Although Orr made no attempt to demonstrate in any specific way that any particular documents fell within the ambit of the privilege, in the circumstances of this case there was enough confusion over the appropriate time to assert privilege that we will permit Orr to make the required showing on remand. Future litigants who make only blanket assertions of privilege at enforcement proceedings should not expect such grace.

APPENDIX B1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 79-2630

U.S. COURT OF APPEALS
FILED
MAY 1 - 1981
GILBERT E. GANUCHEAU
CLERK

UNITED STATES OF AMERICA and EDMOND J. MARTIN, Special Agent, INTERNAL REVENUE SERVICE,

Plaintiffs-Appellees,

versus

CRAIG E. DAVIS,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion February 12, 1981, 5 Cir., 198_, _____F.2d____).

(May 1, 1981)

Before WISDOM, AINSWORTH and GEE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

APPENDIX B2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

RECEIVED JUN 17 1981

No. 80-1015

U.S. COURT OF APPEALS
FILED
MAY 1 - 1981
GILBERT E. GANUCHEAU
CLERK

UNITED STATES OF AMERICA
and EDMOND MARTIN, Special Agent,

Plaintiffs-Appellees,

versus

STEPHEN M. ORR,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion February 12, 1981, 5 Cir., 198_, _____F.2d_____).

(May 1, 1981)

Before WISDOM, AINSWORTH and GEE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

United States Circuit Judge